

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EASTCHESTER TRANSPORT CORPORATION	:	DETERMINATION
		DTA NO. 818722
for Revision of a Determination or for Refund of Sales and :		
Use Taxes under Articles 28 and 29 of the Tax Law for		
the Period December 1, 1994 through November 30, 1995. :		

Petitioner, Eastchester Transport Corporation, 141 West 10th Street, New York, New York 10014, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1994 through November 30, 1995.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 20, 2002, at 10:30 A.M. Petitioner requested and was granted until October 20, 2002 to submit additional documentation, and the Division of Taxation was granted until November 20, 2002 time to comment on such documentation. November 20, 2002 thus began the three-month period for the issuance of this determination. Petitioner appeared by Letitia Ragno, president. The Division of Taxation appeared by Barbara G. Billet, Esq. (Sean M. Campbell).

ISSUE

Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

FINDINGS OF FACT

1. On August 5, 1999, following an audit, the Division of Taxation (“Division”) issued to petitioner, Eastchester Transport Corporation, a Notice of Determination which asserted \$92,037.94 in additional sales and use taxes due, plus penalty and interest, for the period December 1, 1994 through November 30, 1995.

2. During the period at issue petitioner was registered as a Retailer of Heating Oil Only and as a Residual Petroleum Product Business. Petitioner primarily sold number 2 oil to governmental entities and residential and commercial customers. In or about December 1995, petitioner sold its customer list and its former name, “Brooks Fuel Oil, Inc.” Following this sale, petitioner sold petroleum product pursuant to contracts with governmental entities only.

3. The audit process in this matter began with a conversation in October 1997 between the Division’s auditor and petitioner’s president, Letitia Ragno. During that conversation the auditor requested that petitioner make available for review its books and records for the period under review. In response Ms. Ragno advised the auditor that petitioner’s office had been broken into on two occasions and that many of petitioner’s records had been stolen. The auditor followed up this conversation with an audit appointment letter dated October 6, 1997, in which the Division requested that petitioner make available for review its books and records for the audit period. The October 6, 1997 letter specifically requested delivery tickets, inventory records, sales journals and tax returns.

4. Petitioner did not have any delivery tickets, inventory records, sales journals or any other verifiable record of sales to make available for the Division’s review. Petitioner did produce its customer list which, as noted, had been sold by petitioner in or about December 1995. This document listed the names, addresses, and telephone numbers of petitioner’s

customers along with a price per gallon amount for each customer. The customer list did not provide any information regarding the dates or amounts of any specific sales and did not indicate whether any of the customers listed had made any purchases during the audit period. The customer list also did not provide any information regarding the petroleum product purchased by the customer.

5. In the absence of any records of sales for the audit period, the Division estimated petitioner's sales and use tax liability. As a starting point, the Division accepted, after verification, amounts reported as "gallons available" on petitioner's petroleum business tax returns for the audit period. Such "gallons available" totaled 8,880,987 gallons for the audit period. Next, the Division examined petitioner's customer list to determine which of the customers listed were commercial accounts and which were residential. The Division made this determination by first reviewing the names of the customers, i.e., whether the accounts had business names, and then by using a computer program called "phonedisc" which indicates to the Division whether business phones are in use at a particular address. The Division determined that the addresses with business phones only were commercial accounts. Using this method, the Division determined that 166 or 9.64 percent of the 1,722 accounts listed on petitioner's customer list were commercial accounts. Next, the Division multiplied total gallons available by the commercial percentage and then doubled the result to reach 1,712,246 commercial gallons sold during the audit period. The Division doubled the commercial percentage because, in the auditor's 10-year experience, commercial customers use more fuel than residential customers and because, in the absence of records, there was no way to determine gallons sold to any customer. The Division then multiplied these "commercial gallons" by an average price per gallon of \$0.7742 and calculated additional tax due. The Division calculated the average price

per gallon by averaging the per gallon prices on the customer list. The Division's calculations resulted in the \$92,037.94 in additional sales tax due as set forth in the Notice of Determination.

6. Following the issuance of the Notice of Determination petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. At petitioner's conciliation conference on November 16, 2000, petitioner provided the conferee and the Division's representative with a computer printout listing sales it made to the New York City Housing Authority and to a New York City governmental entity referred to in the record as "Emergency Repair" or "ERP." Upon review of such records, the Division determined that petitioner made exempt sales during the audit period to ERP totaling 119,277 gallons and to the New York City Housing Authority totaling 5,689,725 gallons. The Division recomputed tax due by subtracting these exempt sales from total gallons available for sale. Total gallons available for sale were thus reduced from 8,880,987 gallons to 3,071,984 gallons. The Division applied the commercial percentage of 9.64 percent to these 3,071,984 gallons and recomputed petitioner's tax liability in the manner described above (*see*, Finding of Fact "5"). Accordingly, pursuant to a Conciliation Order dated June 29, 2001, the Division modified the tax deficiency asserted against petitioner to \$10,591.92, plus penalty and interest.

7. At the small claims hearing in this matter on June 20, 2002, petitioner requested additional time to obtain invoices of sales from petitioner to the New York City Housing Authority. The presiding officer granted petitioner's request and, subsequent to the hearing, petitioner submitted invoices of sales it made to the New York City Housing Authority during the audit period. I have reviewed the invoices submitted and I find that petitioner has established the following additional exempt sales:

Date	Exempt Gallons Sold
2/08/95	3,000
2/09/95	6,500
2/11/95	58,433
2/13/95	45,508
2/14/95	30,008
2/15/95	16,524
2/16/95	6,500
2/17/95	85,153
2/23/95	40,949
Total Additional Exempt Gallons Sold 2/95	292,575

Date	Gallons Sold
6/02/95	41,806
6/07/95	24,800.2
6/16/95	38,784.3
6/19/95	15,147
Total Additional Exempt Gallons Sold 6/95	120,537.5

8. The vast majority of the invoices submitted by petitioner were consistent with the computer printout used by the Division in recomputing the deficiency following the conciliation conference. There were also numerous duplicate invoices. All of the invoices indicated the sale of number 2 oil.

9. Petitioner contended that the following customers, which were included on the Division's list of commercial accounts, were tax exempt organizations:

B. Kelly	Banana Kelly
B. Spanish Evan. Church	Christ the King
N. Concepcion	Congregation Hope

Congregation Temple
I.S. 306 A
Pure Gospel Miracle
S. Community, Inc.

G. Tidings Church
New Tabernacle
S. Day Adventist Church

CONCLUSIONS OF LAW

A. On audit petitioner did not produce any delivery tickets, inventory records, sales journals or any other verifiable record of sales. Under such circumstances, the Division properly estimated petitioner's sales tax liability (Tax Law § 1138[a][1]; *Matter of Licata v. Chu*, 64 NY2d 873, 487 NYS2d 552). Such an estimate audit methodology must be reasonably calculated to reflect taxes due (*Matter of Markowitz v. State Tax Commission*, 54 AD2d 1023, 388 NYS2d 176, *affd*, NY2d 684, 405 NYS2d 454). In this case, considering the absence of any records of sales, the audit method used by the Division was reasonable. Accordingly, petitioner had the burden to establish by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (*Matter of A&J Gifts Shop v. Chu*, 145 AD2d 877, 536 NYS2d 209, *lv denied*, 74 NY2d 603, 542 NYS2d 518).

B. As noted in Finding of Fact "7" petitioner has established additional exempt sales to the New York City Housing Authority during the audit period. The Division is directed to re-compute the sales tax deficiency against petitioner by subtracting these additional exempt sales from total gallons available for sale.

C. Petitioner has also shown that the commercial percentage should be reduced because certain tax exempt customers were included in the list of taxable commercial accounts. Consistent with Division's analysis of the customer list, i.e., a review of the names of the customers, I find that the customers "B. Spanish Evan. Church," "Christ the King," "Congregation Hope," "Congregation Temple," "G. Tidings Church," "New Tabernacle," "Pure

Gospel Miracle,” and “S. Day Adventist Church” are exempt organizations. The number of commercial accounts should therefore be reduced from 166 to 158 and the commercial percentage reduced accordingly from 9.64 percent to 9.18 percent. Petitioner’s contention that certain other exempt organizations were included on the list of commercial accounts (*see*, Finding of Fact “9”) is rejected as unsubstantiated.

D. Petitioner also asserted that the list of commercial accounts improperly included customers to whom petitioner sold number 4 and number 6 heating oil. Petitioner offered no evidence of any sales of number 4 or 6 heating oil. Accordingly, this assertion is rejected.

E. The petition of Eastchester Transport Corporation is granted to the extent indicated in Conclusions of Law “B” and “C”; the petition is in all other respects denied. The Division of Taxation is directed modify the Conciliation Order dated June 29, 2001 in accordance with Conclusions of Law “B” and “C”; except as so modified, the Conciliation Order is sustained.

DATED: Troy, New York
January 30, 2003

/s/ Timothy J. Alston
PRESIDING OFFICER